PUBLIC PROSECUTOR

v.

LIM TEIK SENG & ORS.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL TRIAL NO. 9 OF 1979]
19 DECEMBER 1983

CRIMINAL LAW AND PROCEDURE: *Drug trafficking - Statutory presumption that persons knew the contents of a sack which was in their possession contained drugs.*

The accused persons were charged under s. 39B(1)(a) of the Dangerous Drugs Act for trafficking in drugs. A police ambush party arrested them when a lorry which was driven by the 3rd accused and which carried the 2nd accused stopped behind a car driven by the 1st accused. There was conflicting evidence as to why the vehicles stopped.

Held:

[1] The Court accepted the prosecution's version that the driver of the car overtook the lorry and signalled for it to stop.

[2] The 1st and 2nd accused were seen carrying a sack which contained drugs which they dropped when they saw the police.

[3] Although tests conducted of finger-nails of the 1st and 2nd accused showed no signs of contamination of drugs, the Court held that tests showing contamination of the sack did not indicate inconsistencies in the prosecution's case. The Court concluded that their hands would not be contaminated if the contamination was minimal or it could have been removed by rubbing on uncontaminated surfaces or they could have held the ends of the sack which were not contaminated.

[4] The Court did not accept the 3rd accused's testimony that he did not know how the sacks, one of which was carried by the 1st and 2nd accused prior to their arrest, were placed on the lorry. The Court accepted the 2nd accused's testimony that it was placed on the lorry with the knowledge of the 2nd and 3rd accused.

[All 3 accused found guilty and sentenced to death.]

Cases referred to:

Haw Tua Tau v. PP [1981] CLJ (Rep) 11
Muniandy & Ors. v. PP [1966] 1 MLJ 257
PP v. Shanmugam [1963] MLJ 125
Goh Ah Yew v. PP [1949] MLJ 150
Regina v. Gallagher [1974] 1 WLR 1204
PP v. Lim Kuan Hock [1967] 2 MLJ 114
Teh Choo Wah v. PP [1967] 2 MLJ 95
R. v. Donaldson 64 CAR 59
R. v. Pearce 69 CAR 365
R. v. Turnbull [1976] 3 All ER 549
R. v. Oakwell [1978] 1 All ER 1225
R. v. Keane 65 CAR 248

Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 37(d), (da), 39(B)(1)(a), B(2)
Penal Code, s. 34

For the public prosecutor - Mohd. Nordin Sulaiman
For the 1st & 3rd accused - Karpal Singh; M/s. Karpal Singh & co.
For the 2nd accused - R. Rajasingam; M/s. R. Rajasingam & Co.

JUDGMENT

Edgar Joseph Jr J:

The three accused persons in this case were jointly prosecuted before me on the following charge:

> That you jointly on 27 November 1978, at about 11.00 p.m. at Kampong Bongsu Seribu, Kepala Batas, in the District of Butterworth, in the State of Penang, in furtherance of the common intention of all, did on your own behalf traffic in drugs, to wit, 1,000 grammes of morphine, (the exact weight will be confirmed by the Chemist), in contravention of the provisions of paragraph (a) of Sub-section 39B(1) of the Dangerous Drugs Ordinance No. 30 of 1952, and that you have thereby committed an offence punishable under s. 39B(2) of the said Ordinance, read with s. 34 of the **Penal Code.**

A wealth of evidence was led by the prosecution as to the movements of a particular lorry on its journey from Padang Besar to Kampong Bongsu Seribu where it was alleged it made its rendezvous with a Volkswagen car and the actions of its driver and passenger as seen through the eyes of a number of police officers who comprised an ambush party but I do not consider it necessary - indeed it would be tedious - to recount in detail the sometimes differing versions of what each of them, sometimes in different positions, saw at various stages of that journey. All that I propose to do, therefore, is to set out in broad outline the essential facts of the prosecution case which strike me as being of a serious or vital nature.

The narrative of events begins on 27 November 1978 when Inspector Zulkifli bin Yusof (PW5), Officer-in-Charge, Anti-Narcotics Section, Kedah/Perlis, acting on information received, sought the assistance of Acting Assistant Superintendent of Police Idrus bin Ibrahim (PW3), who was then attached to Kedah/Perlis, Police Headquarters, to lay an ambush with a view to apprehending certain persons who, it was believed, would be engaged in drug trafficking activities. So, on the same day, at about 1.00 P.m., the police parties, one led by Idrus and the other by Zulkifli, proceeded to Padang Besar. There, Zulkifli briefed all the officers, after which he directed Idrus and his men, namely, Ramly (PW15) and Hamid (PW16), to proceed to Berseri, a small town on the main road from Padang Besar to the south, while Zulkifli and his party consisting of Detective Corporal Maniam, DPC Rahmat, DPC Noh and DPC Samsuddin, remained at Padang Besar, which was about 15 miles from Berseri.

At about 6.00 p.m. the same day, the target of the proposed ambush, being a lorry, No. BR 6015 bearing crates of fish was seen coming form Padang Besar Customs check-point and stopping at Padang Besar town for half an hour. The passenger and driver, being the second and third accused, respectively, were also seen to alight from the lorry for a drink. At this point, nothing was loaded onto, nor was any thing unloaded from, the lorry, which resumed its journey in a southerly direction. Unknown to the second and third accused, the lorry was then being trailed by Zulkifli and Idrus, each accompanied by his party of men, in their respective cars, in that order.

On arrival at Alor Star, the lorry proceeded to Market Merjong, Jalan Putra, where it stopped. It was then kept under observation by Ramli and Samsuddin. So were its occupants. Ramli observed the second and third accused merely unloading a few crates from the lorry; there was no loading. Half an hour later, the lorry proceeded south, towards Sungei Petani, followed, as I have said, by the two police cars. On the way from Alor Star to Sungei Petani, the lorry

stopped at a place called Simpang Empat Kankong. Both police vehicles also stopped, a safe distance behind. The passenger who was sitting next to the driver was seen to alight from the lorry and walk into a coffee shop nearby. Five minutes later, he returned to the lorry which then proceeded in a southerly direction, again followed by the two police cars.

On arrival at Sungei Petani, the lorry again stopped, for a few minutes, the passenger alighted and then returned to his seat within a few minutes without going anywhere. The lorry then resumed its journey, proceeding in the direction of Butterworth for about five miles when again it stopped. Once again, the passenger was seen to alight and go to the grass verge near where the lorry had stopped. A few moments later, he returned to his seat. After a short while, the lorry continued its journey, proceeding in a southerly direction.

On arrival at Kapala Batas, the lorry turned left into a side road proceeding in a southerly direction towards Kampong Bongsu Seribu. Both police parties continued to follow the lorry. On arrival at a junction at Kepala Batas, a Volkswagen car was seen to overtake both police vehicles and a little later, the lorry as well.

As he overtook the lorry, the Volkswagen driver flashed his rear left signal light and, according to PW6, under cross-examination by Mr. Rajasingam, so did the lorry driver. Then both the lorry and the car pulled up by the road side. At this point, Idrus was driving up from the rear of the lorry. He slowed down, and, as he passed the lorry, he saw two male Chinese carrying a plastic sack. They were between the lorry and the Volkswagen, which were parked about five feet apart, on the same side of the road, and walking towards the Volkswagen, its front passenger door being wide open. Idrus immediately stopped his car between the two vehicles and he and his men, namely, Ramli and Abdul Hamid, alighted. Ramli and Hamid went after the two male Chinese, one of whom shouted "Am Pai", the Hokkien word for "Police". They both then panicked, threw the plastic sack (P3) to the ground and took to their heels in the opposite directions, one towards the Volkswagen and the other towards the lorry, but Ramli and Hamid were quick enough to apprehend them after a short chase. The two male Chinese were none other than the first and second accused, the former being the driver of the Volkswagen car and, the latter, as I have said, the passenger of the lorry. Meanwhile, Idrus pounced on the third accused, who was then frantically trying to reverse his lorry, apparently to make a quick gateway, for the Volkswagen and Idrus' car were obstructing his path, and placed him under arrest. All three accused were then handcuffed and standing near the lorry when Zulkifli and his party arrived very shortly thereafter. The sack, which the first and second accused dropped, was duly recovered. It was green in colour, and an examination of its contents disclosed fifteen slabs (Exh. P5 a to o) of what was suspected to be morphine. The lorry was subjected to a thorough search and, from a compartment in the upper portion of the driver's cabin, which, for brevity and convenience, I referred to during the trial as "a little attic," there was recovered by Ramli, another plastic sack (Exh. P4). The contents of this, too, were examined and found to be a further fifteen slabs (Exh. P6 a to o) of what was also suspected to be morphine.

All three accused and the exhibits recovered were brought back the same night to the Kepala Batas police station, the lorry being driven by Shaari bin Taib (PW4).

On arrival at the Kepala Batas police station, all three accused were detained at the Conference Room and the thirty slabs placed on a table there. Meanwhile, the Chemist, Mr. Cheng Eng Thuan (PW3), was immediately summoned. He arrived at 3.40 a.m. on 28 November 1978, that is, some 4½ hours after the arrest. He wasted no time and proceeded forthwith to take hand swabs from all three accused persons but finger-nail clippings from the first and second accused persons only. This was because the finger-nails of the third accused were too short.

These specimens he subsequently certified yielded a negative result but the fifteen slabs he found were indeed morphine, a dangerous drug within the meaning of s. 2 of the **Dangerous Drugs Act** 1952 (the Act).

At this stage I must mention a fact upon which the defence placed much stress. During the prosecution Case, the Chemist carried out a test, at the request of the defence and by leave of the Court. This consisted of an examination of the external surface of the green sack (P3) to see if there was any evidence on it of traces of morphine. The results were positive except for the area described as the neck of the sack. Specifically, this is what he said, and I shall quote him in full.

> Yes, I have carried out the necessary colour tests - yes they are preliminary tests.
>
> I swabbed outer surface of the green sack (P3) and found the outer sack surface to give a positive reaction with the two colour tests which I carried out. Similarly, I found the outer surface of the white sack (P4) to give a positive reaction with the two colour tests which I carried out.
>
> Q. If two persons were to carry the sack with their bare hands, would there be a likelihood of contamination?
>
> A. Yes.
>
> Yes, I took hand swabs from both accused persons on 28 November 1978 at about 3.40 a.m. at the Kepala Batas police station.
>
> *By Rajasingam*
>
> I agree it is possible that if the sacks had come from the "attic floor" in the driver's cabin of the lorry then their outside surfaces would be contaminated with the whitish substance.
>
> *Re-examined by DPP*
>
> If a hand contaminated with morphine comes into contact with any matter there will be a physical transfer of morphine onto the matter. Despite such transfer some morphine may still be left on the contaminated hand. Every chemical test has its sensitivity limit: consequently very minute contamination may not be detectable on test.
>
> Yes, I also conducted a separate test this morning on the outside surface of the neck of the green sack (P3) to determine if it was contaminated with drugs. The two preliminary tests on this part of the sack (i.e. the outside of the neck) did not give me any positive reactions. Yes, my swabbing this morning covered the whole external area of the plastic sacks P3 & 4 including the two corner bases.
>
> Yes, the outside area of sacks contaminated with the drug could have been anywhere except the neck - I can't pin-point which part of the sacks were contaminated.
>
> My findings in respect of tests carried out this morning were the same for both P3 & P4.
>
> *K. Singh by leave of Court* - no objection by DPP:
>
> This morning, although I did not untie the sacks P3 and P4, I had swabbed the whole area of the sacks even though they were folded. I would emphasize that I swabbed the whole area outside of the neck of the sacks including the area above the strings.
>
> Yes, I confirm that I found no positive signs of contamination only on area of the neck of the sacks above the string. However, as I have already said, I found positive signs of contamination on the rest of the area of the outside of the sacks though I can't pin-point the area which gave the positive reaction.
>
> *ReXnd. by DPP:*
>
> When I say neck of the sack I mean the whole of the end of the sack above the string.

To Court:

The tests I carried out this morning are only preliminary tests and are not precise and accurate.

An important question for determination was whether the above evidence of the Chemist upon recall, went to flatly contradict the testimony of PW3, PW5 and PW15 that they saw the first and second accused carry the offending sack, P3, and its contents. It is true that during the three hours and forty minutes they were in custody prior to samples of hand-swabs and finger-nail clippings being taken the accused persons were under police surveillance and, therefore, had no opportunity to wash away all traces of the drug. In these circumstances, could it be said that the prosecution case was inconsistent in itself?

It must be recognized that the test carried out in Court of the external surface of P3 was conducted nearly five years after the arrest. There was, therefore, every opportunity for contamination of the external surface of P3 to have occurred during this interval. Indeed, even during the progress of the trial before me, my recollection is that P3 and its contents were freely handled by the prosecution, the defence and the interpreters. Certainly there was such handling by the police both at the scene of arrest and later that night at the Kepala Batas police station. Then again, there was no evidence as to whether or not the external surface of P3 was contaminated at the time of the arrest. As I have said, contamination could easily have taken place long afterwards. Once the fact is recognized as being of primary importance, the point as to the prosecution case being inconsistent in itself loses most, if not all, its sting.

Next, as will appear later on in this judgment when the case of the second accused is discussed, there is his admission that he had handled the sacks, P3 and P4, when they were first taken aboard the lorry and later, when he transferred them from the goods compartment to the floor-board of driver's cabin, yet hand-swabs and finger-nail clippings taken from him disclosed a negative result.

There is also substance in the point that although the external surface of P3 was contaminated, the Chemist could not pin-point exactly which parts were actually contaminated. Certainly, he said, the neck of the sack above the string was not contaminated, and also that the tests carried out were merely preliminary tests. In these circumstances, even assuming that the external surface was contaminated at the time of the arrest, a person carrying the sack, especially by its ends, as deposed to by PW3 under cross-examination by Mr. Karpal Singh, was not bound to be contaminated, or, alternatively, contamination could be minimal. Moreover, contamination could be removed by rubbing or by contact with any uncontaminated surface.

Consequently, I was not prepared to hold that the Chemist's evidence rendered the case for the prosecution inconsistent in itself.

The prosecution also introduced, as part of its case, a cautioned statement recorded from the second accused to prove that exhibits P3 and P4 had a Thai origin, that they were concealed on the lorry so cunningly that they did not attract the attention of Customs authorities on both sides of the Thai-Malaysian border. They also relied on it to show that the second and third accused were aware of its presence on the lorry since both items were apparently received from two unknown male Thais who stopped the lorry while on its way from Songkla to Padang Besar and asked the third accused to deliver them to a friend who would be driving a Volkswagen car. The third accused obliged and requested the second accused to assist him in loading the exhibits onto the lorry, which the latter did. Evidence

was also led to show that the vehicles concerned belonged to the United Songkla Fish Co., a Thai-Malaysian company engaged in conveying fish in crates form Haadyai in Thailand to Kuala Lumpur in Malaysia and that the second and third accused were employed by the company as drivers, the second accused being a relief driver.

At the close of the case for the prosecution, I told Counsel for the defence that I was not prepared to hear them as I was amply satisfied that there was a case to answer: (see *Haw Tua Tau v. PP* [1981] 2 MLJ 49).

I now turn to consider the case for the defence. All three accused gave evidence on oath and were cross-examined at length.

The first accused testified that he was a used-car broker by occupation residing at Sungei Petani, Kedah, and that on the night in question, at about 10 p.m., he had just returned home when he was told by his wife that somebody had telephoned in his absence to say that his younger brother was looking for him. So, without further ado, he left in his car for Kota Semang (the Chinese equivalent of Kubang Semang), which was twenty miles away, to look for his younger brother who was apparently waiting in a sister-in-law's house. On the way, at Kampong Bongsu Seribu, he had to alight to answer the call of nature. So, he pulled up, alighted, urinated and returned to his car to get some tissue paper, which was near the rear-view window. After getting it, he was about to get out his car when he was stopped and arrested by two persons, who he later came to know were Customs Officers. He explained that to get the tissue paper which was located on the ledge near the rear-view window, he had to enter the car from the near-side and this was why the near-side door was ajar. He found that one of the two men was armed with two hand-guns - a long one and a short one. He was taken to a lorry which was stationary forty to fifty yards behind his car and later made to stand together with the second and third accused persons. He then saw a search being conducted of the lorry by a number of persons and saw two members of the raiding party from the rear portion of the lorry, each carrying a sack. He emphasized that the second and third accused persons were total strangers to him and denied the allegation that he and the second accused were carrying the sack, P3, from the lorry and going towards the car when they were pounced upon by the police. Similarly, he denied that there was a shout "Am Pai", that they dropped the sack and ran. He claimed, that upon being arrested, he did ask "Apa fasal?", to which he received the reply "Apa fasal nanti tahu la".

Under cross-examination, he explained that his younger brother wanted to meet him at his sister-in-law's house at Kubang Semang. No reason was given for the meeting yet he felt that it must have been urgent. He thought that, perhaps, his younger brother might be in need of his car to return to Kampong Pagang where he lived, or, perhaps, there was a prospect of brokerage business for him, though he had never had such business there. He admitted that he did not protest about his arrest though he did ask why he was being arrested. Confronted with his cautioned statement in which he admitted that the Volkswagen and lorry were parked five feet apart, he explained that this was a mistake on the part of the recording officer.

I now turn to assess the evidence of the first accused. It goes without saying that if I believed the testimony of the members of the ambush party, then, the defence of first accused must necessarily fail for, on that version, it was clear that when the first accused stopped at the side road it was not to answer the call of nature but pursuant to a pre-arranged plan with the other two accused persons to meet there and to take delivery of the offending exhibits. There was also clearly on that version evidence of manual possession on the part of the first accused of the offending sack, P3, and its contents sufficient to attract the presumption

of trafficking by virtue of s. 37(d) & (da) of the Act. I arrived at the inevitable conclusion that the testimony of member of the raiding party, chiefly that of PW3, PW5 and PW15, was that of witnesses of truth. They were subjected to long and searching cross-examination by both Counsel and yet remained unshaken and unbroken. However, I recognized that this fact alone was not *per se* an all-sufficient acid test of credibility and that the inherent probability or improbability of a fact in issue must be the prime consideration: (per H.T. Ong FJ in *Muniandy & Ors. v. PP* [1966] 1 MLJ 257). It was on this basis that I found their testimony entirely acceptable.

There were certain obvious unsatisfactory features in the testimony of the first accused which I shall presently mention.

It strains credibility to accept that upon returning home at 10 p.m. and being informed by his wife that his brother wanted to meet him at his sister-in-law's house that the first accused should, without even enquiring what the intended meeting was for, and without further ado, proceed at that late hour to drive all the way to Kubang Semang to meet his brother purely on the supposition that the brother might be needing a lift or that he might have some brokerage business at hand. Surely, the matter could wait until the following morning, since there was no element of urgency involved. To make matters worse for him, the first accused called neither his wife nor his brother to substantiate his version.

I recognize that, in Law, the defence of an accused does not require corroboration though it goes without saying that corroboration would certainly help: *(PP v. Shanmugam* [1963] MLJ 125). Similarly, no adverse inference could be drawn against an accused person by reason of his failure to call any witness and, indeed, there is no duty on the defence to call any evidence for all that it has to do is to raise a reasonable doubt: *(Goh Ah Yew v. PP* [1949 MLJ 150). However, the failure to call any particular witness is a matter which the Court may take into account in assessing the weight of evidence (without drawing any adverse inference) especially so when the potential witnesses were persons in respect of whom the prosecution had probably no means of knowing that they might have any relevant evidence to give until the accused himself came to give evidence: *(Regina v. Gallagher* [1974] 1 WLR 1204; *PP v. Lim Huan Hock* [1967] 2 MLJ 114, 115; *Teh Choo Wah v. PP* [1967] 2 MLJ 95, 100).

There is also the telling admission made by the first accused in his cautioned statement that his vehicle was a mere ten feet from the lorry and not fifty yards as alleged by him in evidence. It is true to say, however, that the first accused in his cautioned statement did mention that he had stopped along the side road in order to answer the call of nature. This was quite consistent with his defence in Court but when it is recognised that this statement was recorded from him several hours after his arrest at a time when he had ample opportunity to regain his composure and to reflect upon his desperate position I do not think that the fact that this consistency between his evidence in Court and his statement should be given undue weight. It is, moreover, a self-serving statement of a purely exculpatory nature and in accordance with the principles enunciated in *R. v. Donaldson* 64 CAR 59, 64 it:

> Is evidence in the trial in that it is evidence that the defendant made the statement and of his reaction which is part of the general picture... but it is not evidence of the facts stated."

To the same effect is the case of *R. v. Pearce* 69 CAR 365.

The gist of the defence of the second accused was that he was a mere servant, that he received P3 and P4 in the course of his duty and had no knowledge as to their contents. More particularly, he said, that on the day in question he left Songkla with a lorry load of fish. His co-driver was the third accused. From Songkla up to Padang Besar the third accused

was at the wheel while he was seated next to him. On the way from Haadyai to Padang Besar, the lorry was stopped by a motor-car bearing a Thai registration number. Two male Siamese alighted from the car and one of them spoke to the third accused and requested him to deliver two packets of goods to his friend who would be driving a Volkswagen and would collect the two packets while they were proceeding on their way. The third accused then instructed him to take the two packets and place them in the goods compartment in the rear of the lorry, which he did. He confirmed that the packets in question were P3 and P4 though he did not then know their contents. He added that upon arrival at Padang Besar, at about some time past 4.00 p.m., the vehicle passed through the Customs check-point, uneventfully, after a routine check. They then had dinner at a nearby shop, after which he took over the wheel and the third accused was seated next to him. The lorry proceeded southwards and, on arrival at Alor Star, it stopped at a market where they unloaded the crates of fish from the lorry and then resumed their journey southward. On the way from Alor Star to Sungei Petani, they stopped at Simpang Empat to enable the third accused to get refreshments. They then resumed their journey to Sungei Petani and, on arrival there, on the instructions of the third accused, he stopped the lorry. The third accused then looked around - he did not know what for - and then took over the wheel. As they proceeded, the third accused told him that he had seen a Volkswagen. They continued their journey southward. On arrival at Kepala Batas town, they took a turn to the left and entered a side road leading to Bukit Mertajam. On arrival at Kepala Batas, on instructions from the third accused, he removed the two packets from the rear portion of the lorry to its front. On the way, the third accused stopped the lorry. He did not know why. At this point, the accused was following the Volkswagen, which suddenly stopped. The third accused also stopped his lorry behind the Volkswagen. As soon as the third accused stopped the lorry, a car came from behind and pulled up in front of the lorry. A number of persons rushed out of it. They were armed with guns and surrounded the lorry. The sacks, P3 and P4, with their contents, were brought down from the lorry and placed by the roadside near it. He denied that at the time the Customs Officers appeared on the scene, the first and third accused were carrying P3 and its contents from the lorry to the Volkswagen, or at all, and ended with a formal account of their being taken to the Kepala Batas police station.

As in the case of the first accused, having accepted as I did the testimony of PW3, PW5 and PW15, which affords ocular proof of manual possession on the part of the first and second accused of the offending sack, P3, and its contents, his defence must surely fail.

I have already said why I believed the testimony of these prosecution witnesses. I therefore find it unnecessary to restate those reasons. On the second accused's own version, he was aware of the presence of P3 and P4 and their contents (though he claimed he did not know they were drugs) right from the start, when he helped place them in the lorry on the instructions of the third accused. I find it impossible to accept his evidence that he never even bothered to ask the third accused what these sacks contained bearing in mind the suspicious circumstances in which they were taken aboard. It will be recalled, that according to him, two Thais stopped the lorry on the journey from Haadyai to Padang Besar and requested the third accused to take delivery of the two sacks and their contents for transportation to the driver of Volkswagen car who would meet them on the way. I made all due allowance for the fact that the second accused was a mere relief driver and, ordinarily, if goods are conveyed in the normal course of business it would be too much to expect a person in the position of the second accused to query his employer regarding the nature of goods he is asked to convey but, on the second accused's own version, these goods were

not conveyed in the ordinary course of business and, furthermore, were conveyed, not on the instructions of his employer, but on those of the third accused who was himself a mere driver. There is the further consideration that this was a vehicle whose business it was to convey crates of fish from Haadyai to Kuala Lumpur and not articles or goods such as the contents of P3 and P4. The second accused, therefore, must have been put on enquiry when the goods were taken aboard the lorry and must have known their contents. I have no hesitation in rejecting his defence as unreasonable and improbable and so far-fetched as to be laughed out of Court.

The case for the third accused was that at the material time he was residing in Haadyai, Thailand, was employed as a lorry driver by the United Songkla Fish Co., and that the second accused was his co-driver. At about 3.30 p.m. on 27 November 1978 he was driving a lorry from Songkla to Malaysia. He denied there was any truth in the allegation made by the second accused that on the way from Songkla to Padang Besar a car with two male Thais stopped his lorry or that he was requested by them to take and deliver the two sacks, P3 and P4, with their contents to a friend who would be driving a Volkswagen and who would meet them on the way. Consequently, he denied that on his instructions, the second accused received the two packets and placed them on the lorry or that at Padang Besar he had requested the second accused to remove the packets from the rear to the front part of the lorry. He claimed that before his arrest he did not notice the two sacks, P3 and P4, and their contents on the lorry. He said that on the journey from Padang Besar to Kepala Batas he entered a side road leading to Kepala Batas when his gears got jammed which compelled him to pull up. The police car came from behind and stopped in front of his lorry. A number of police men then rushed out from the car and surrounded the lorry and it was in these circumstances that he and the second accused were arrested. He denied, that while proceeding along the side road, a Volkswagen car overtook him and pulled up in front of his lorry and that he, too, pulled up. He did, however, admit that there was a small car parked ahead of him, about forty yards away from his lorry, on the same side of the road. He claimed that the first time he saw the first accused was when he was brought by the police to the scene. However, he had worked with him along the Songkla-Bukit Mertajam route and that, apart from being a co-driver, he was also a good friend. He admitted that when he saw that the first accused was arrested he did not query the second accused regarding this. He confirmed that at Sungei Petani he took over the wheel from the second accused and that he had there alighted. He denied that on seeing the first accused's car at Sungei Petani he had told the second accused that he had sighted the Volkswagen car. At the side road, when his gears jammed, he claimed that the second accused alighted but did not say where he was going. Later he said that the second accused told him that he needed a rest as he was very tired. He maintained that the second accused was not with him when he was arrested. Put to him that the first and the second accused were carrying a sack, P3, just before they were arrested, he said he could not say in what circumstances they were arrested as he did not witness this. Later he said that the prosecution witnesses were lying about this. He agreed that the second accused was not telling the truth when he said he was arrested while he was seated in the passenger seat of the lorry. He also said that when he pulled up along the side road the second accused was not in the driver's cabin but, perhaps, in the general goods compartment, or in the little "attic", so he would not have known about the gears jamming. He maintained that he did not know where P3 and P4 came from. He also maintained that they were first opened, not at the scene, but in his presence, in a room, at the Kepala Batas police station that night. He claimed he never saw P3 and P4. In answer to the Court, he said he did not instruct his Counsel as to the reason why he stopped his lorry. He added he

did not tell his Counsel that the gears of his lorry became jammed and that was why he was compelled to pull up. He explained that he did not tell his Counsel this because he was not asked. He also said that the first time he mentioned about his having to pull up because of the gears jamming was in this Court.

I now turn to assess the evidence of the third accused. It will be readily seen that his version conflicted violently with that of the second accused regarding the circumstances in which the offending sacks, P3 and P4, with their contents, came to be loaded onto the lorry. Specifically, he totally denied the evidence of the second accused that two Thais stopped the lorry on the road from Haadyai to Padang Besar and handed him the two sacks which he instructed the second accused to load onto the lorry. Instead, his version was that the sacks were in the lorry when he first came to get on it and that at the Customs check-points at both the Malaysian the Thai sides the Customs did not notice them. I find this impossible to accept in view of the size of the sacks and the fact that it would be the duty of Customs Officers to check the lorry for dutiable goods. Then again, his version that he was compelled to stop at the side road at Kampong Bongsu Seribu because the gears of his vehicle had jammed was never put to the policeman (PW4) who drove the vehicle from the scene after the arrests and who apparently did so without any difficulty. Nor for that matter was this incident about the alleged jamming of the gears put to any of the prosecution witnesses. Questioned by the Court as to whether or not he had instructed his Counsel regarding this incident, he recalled that he had not done so because he was not asked. Again, I found this version totally unacceptable since he was represented by Counsel with very considerable experience in criminal matters. The reason for the stoppage of the lorry at the side road is, practically speaking, a matter of critical importance. Accordingly, I consider, and so find, that an incident such as this, if true, would surely have been duly brought to the attention of Counsel by the second accused. I regard this omission as a fatal flaw in the case for the third accused.

In passing, I would pause to remark, that as often happens when there is a dog fight between defendants in a criminal trial - and by this I mean where one defendant in the course of his evidence puts forward a defence which constitutes an attack upon his co-defendant, as happened in this case, so far as the second and third accused persons were concerned - the results are usually disastrous for both.

I did consider, with the utmost care, every aspect of the evidence tendered by the prosecution and the defence and the submissions made thereon. It is fundamental that it is not for the defence to prove anything and that all that is required of the defence is to render an explanation that is reasonable and probable which casts a doubt, either as to the truth of the prosecution case or as to the guilt of the accused. However, a mere fanciful or imaginary doubt which can be dismissed with the remark "Of course, that is possible but not in the least probable" will not suffice. Applying this test, I unhesitatingly arrived at the inevitable conclusion that the explanation given by all the three accused persons did not meet these requirements. On the other hand, I was entirely satisfied upon the evidence as a whole, both oral and otherwise, that the prosecution had established the charge of trafficking in dangerous drugs against all three accused persons beyond all reasonable doubt, regard being had to the definition of "trafficking" in s. 2, the presumptions contained in s. 37 sub-sections (d) and (da) of the Act and the doctrine of common intention embodied in s. 34 of the Penal Code.

In arriving at this conclusion I did so mainly because of the impression made upon me by the members of the raiding party while giving evidence and the evidence of the surrounding circumstances. I was satisfied, having seen them give their evidence, and having observed their demeanour, especially under cross-examination, that they were witnesses of truth. On the other hand, for the reasons already stated, I found the accused persons wholly unreliable.

I bore in mind the conditions as to visibility at the *locus in quo* at the time the police party struck and warned myself of the dangers of mistaken identity in accordance with the cases of *R. v. Turnbull* [1976] 3 All Er 549; *R. v. Oakwell* [1978] 1 All ER 1223; *R. v. Keane* 65 CAR 248. I was satisfied that there was no risk of such mistake since the accused persons were arrested on the spot and, for all practical purposes, caught red-handed. Moreover, apart from the police party, no one else was anywhere at or near the scene, and the defence raised no issue regarding this aspect of the case.

In the event, I found all three accused persons guilty of the offence charged and I entered convictions against each of them.

As to sentence, as when examining the evidence, I gave this matter my utmost consideration. I had remarked in Open Court, and I now repeat, that the quality of dangerous drugs seized in this case, to wit, morphine, was monstrous. Indeed, I know of no reported case in this country, as at the date of the conclusion of this trial, where a larger quantity had been recovered by the Police or the Customs and, although all three accused had clean records, I found no extenuating circumstances for exercising my discretion in their favour. It would be superflous to emphasize that the drug problem in this country has now reached epidemic proportions and one of the only ways for checking it is to make it plain to all those concerned in the drug world that if and when a conviction is secured for an offence of trafficking in drugs, the Law will be enforced with the utmost rigour. These remarks are now academic since in all trials for drug trafficking in the High Court in respect of offences committed on or after the coming into force of the recent amendments, once a conviction is secured, the Judge has no option but to pass the sentence of death.

It was for the above reasons that I imposed the extreme penalty of death against all three accused.

Also found at [1985] 2 CLJ 61